

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 20, 2008 Session

DENNIS D. PLEMONS, SR. v. STATE OF TENNESSEE

Appeal from the Criminal Court for Roane County
No. 12589 Russell E. Simmons, Jr., Judge

No. E2007-00080-CCA-R3-PC - Filed September 8, 2008

After his conviction for driving under the influence (“DUI”) was upheld by this Court on appeal, Petitioner, Dennis D. Plemons, Sr., sought post-conviction relief on the basis of ineffective assistance of counsel. *See State v. Dennis D. Plemons, Sr.*, No. E2004-01558-CCA-R3-CD, 2006 WL 304714 (Tenn. Crim. App., at Knoxville, Feb. 9, 2006). After a hearing on the petition, the post-conviction court entered an order denying post-conviction relief. After a thorough review of the record, we determine Petitioner failed to establish that he received ineffective assistance of counsel at trial. Accordingly, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Michael W. Ritter, Oak Ridge, Tennessee, for the appellant, Dennis D. Plemons, Sr.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; J. Scott McCluen, District Attorney General; and Frank Harvey, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

Petitioner was convicted of DUI by a Roane County jury. At trial, the facts showed that:

Tennessee Highway Patrol Officer Gary Snow testified that on October 3, 2000, he was dispatched to investigate a wreck. He said he arrived to discover the defendant's car down an embankment. He said no skid marks were apparent on the road. He said the defendant was standing outside a house near the scene. He said that he talked to the defendant and that the defendant admitted driving the car, explaining that the wreck occurred because he was driving too close to the shoulder.

Officer Snow testified that the defendant smelled of alcohol. He also said the defendant "had apparently urinated on himself, and maybe some feces on him, too." He said that the defendant was unsteady on his feet and that his speech was slow. He said he believed the defendant was under the influence of alcohol and asked the defendant to perform three field sobriety tests. He said the defendant refused to perform one of the tests and failed the other two. He said he determined the defendant was under the influence of alcohol and asked him to take a blood alcohol test, to which the defendant consented. He said Roane County Sheriff's Department Deputy Thad Watkins helped administer the test.

On cross-examination, Officer Snow admitted the defendant willingly cooperated. Officer Snow acknowledged that the defendant refused to perform one of the field sobriety tests because of injuries to his knees and arms. He said, however, he did not think it would be difficult for someone who had just been in a similar accident to be able to walk a straight line. Officer Snow admitted that he did not know whether the wreck affected the defendant's ability to perform the tests.

Thad Watkins testified that on October 3, 2000, he was a deputy with the Roane County Sheriff's Department. Mr. Watkins said that Officer Snow brought the defendant to the jail at the Sheriff's Department, that the defendant consented to a Breathalyzer test, and that he administered the test. He said he observed the defendant for twenty minutes before giving him the test to ensure that the defendant did not do anything that could alter the test results. He said the results of the test reflected that the defendant's blood alcohol content was 0.19%. On cross-examination, Mr. Watkins maintained that he observed the defendant for twenty minutes before administering the test.

The defendant testified that he had an accident on the evening of October 3, 2000, while heading to his friend's house on Dry Fork Valley Road. He said the road was very narrow and did not have shoulders. He said he had had two beers to drink before driving. He said he was taking high blood pressure medicine. He said that he swerved to avoid hitting a deer in the road and that as a result, he lost control of his car and careened down an embankment twenty to thirty feet before coming to a rest. He said he hit many trees while careening down the embankment. He said that he was "kind of pinned" in the car and that he needed the assistance of three other people to get out of the car.

The defendant said he refused to perform one of the field sobriety tests because his knees, which had been surgically repaired after a football injury, were hurting. He said that female jailers attempted to administer the Breathalyzer test, that they could not get the machine to work, that Mr. Watkins punched some keys on the machine, and that he then told the defendant that the defendant was extremely intoxicated. He said that although Mr. Watkins talked to him briefly, Mr. Watkins did not do so for twenty minutes. He said he was talking to the female jailers and to Officer Snow but not to Officer Watkins during the time he was waiting to take the Breathalyzer test. He said he was not intoxicated enough "to wait two hours and then come over here and take a test and blow that much."

On cross-examination, the defendant said he was not able to apply his brakes before going over the embankment. He acknowledged he never told Officer Snow that he had swerved to avoid hitting a deer. The defendant maintained that he only had two beers to drink.

Id. at *1-2. On appeal, Petitioner argued that the evidence was insufficient because the officer's testimony was in conflict with the videotape introduced into evidence; any deviation from the norm in his performance of the field sobriety tests was based upon his having been injured as a result of the accident; and the results of the Breathalyzer test were not reliable because of the interference of the female jailers in the test's administration. This Court determined that none of Petitioner's issues had merit. *Id.* at *3.

Subsequently, Petitioner filed a pro se petition for post-conviction relief on May 26, 2006. In that petition, Petitioner argued that his conviction and sentence are void because he received ineffective assistance of counsel because trial counsel failed to have a grasp on the holding of *State v. Sensing*, 843 S.W.2d 412 (Tenn. 1992), failed to object to the admissibility of the breath alcohol analysis test, and fell asleep during a portion of the prosecution's case-in-chief.

Evidence at the Post-conviction Hearing

At the post-conviction hearing, trial counsel testified that he had been licensed to practice law in Tennessee since 1978 and that he practiced exclusively in the area of criminal law and DUI.

According to trial counsel, his license to practice law was suspended on April 1, 2005 after an “agreement of various things.”

Trial counsel did not have a very clear recollection of Petitioner’s trial. With regard to the testimony at trial, trial counsel thought that he asked the officer who administered the breathalyzer test to Petitioner whether he was certified to use the machine, though he wasn’t entirely certain. Trial counsel did recall that he did not seek admission of the officer’s actual certification for operation of the breathalyzer. Trial counsel testified that he was familiar with the general requirements for administering an intoximeter test but could not specifically recall whether he questioned the officer about the requirements in *State v. Sensing*, 843 S.W.2d 412 (Tenn. 1992). Trial counsel informed the post-conviction court that he “always” checked about the timing of the test, i.e. whether a particular defendant was observed twenty minutes prior to taking a breath test. Further, trial counsel noted that it was not always a good tactical decision to attack the validity of the breath test by overly questioning the officers that administered the test. Trial counsel insisted that he would have objected to the admissibility of the test had he thought a violation in procedure had occurred.

Trial counsel acknowledged that he was admonished by the trial court for falling asleep during trial when a video was played for the jury. The trial court stopped the video and asked the attorneys to approach the bench. The trial court told trial counsel to “stay awake.” Trial counsel informed the post-conviction court that he had seen the video prior to trial.

Trial counsel also acknowledged that the trial court asked at one point if he was “feeling alright” or “injured in any way.” When trial counsel responded that he was fine, the trial court instructed him to “stand up” when questioning witnesses and “present a professional appearance” to the jury. Specifically, the trial court admonished trial counsel to stop “leaning” on things like the jury box and the bars. Trial counsel insisted that other attorneys did the same thing that he was admonished for doing in court.

Petitioner did not present any proof at the post-conviction hearing. The post-conviction court entered an order in which it determined:

1. The Court admonished defendant’s trial counsel twice during the trial; both admonishments were accomplished at the bench and outside the hearing of the jury. With regard to the first admonishment the Court finds that said counsel’s inattention was for a brief period, took place during the showing of a video previously viewed by him, and there was no evidence presented that any presentation of testimony by direct or cross examination was encompassed in said time period. The Court finds these matters had no significant effect on the representation of the defendant in this cause nor any adverse effect upon the jury therein.
2. With regard to the allegations of the violation of the standards set in *Sensing* and subsequent cases, the Court finds no evidence in the record, at trial or thereafter, that

suggests or indicates that any evidence would have been excluded if trial counsel had asked the additional questions Petitioner maintains should have been pursued by him. There was, the Court finds significant additional proof of intoxication, including the video which was particularly damaging to the defendant, and the testimony of the State's witnesses concerning his condition. With regard to these matters the Court finds that Petitioner has failed to show by clear and convincing evidence that any alleged deficiencies had an adverse effect on the defense of this case not that any of the alleged deficiencies affected the verdict herein.

As a result, the post-conviction court denied the petition for post-conviction relief. Petitioner appeals this decision, arguing in this Court that the evidence "is sufficient to support a finding of ineffective assistance of counsel." Specifically, Petitioner argues that trial counsel was ineffective because he was not familiar with the decision in *Sensing*, did not object to the State's failure to meet the *Sensing* requirements, did not file a motion to suppress, and did not object to the admissibility of the breath test. Furthermore, Petitioner alleges that trial counsel was ineffective because he fell asleep during trial.

Analysis *Post-Conviction Standard of Review*

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Shields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Ineffective Assistance of Counsel

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to

prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim.” *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997).

As noted above, this Court will afford the post-conviction court’s factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court’s findings. *See id.* at 578. However, our supreme court has “determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo” with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Trial Counsel’s Failure to Follow State v. Sensing

Petitioner claims that trial counsel was deficient because he did not know the requirements of *State v. Sensing*, and failed to object to the admissibility of the breathalyzer test at trial. Although he testified at trial to the effect that Officer Watkins had not complied with *Sensing*, Petitioner failed to offer any evidence at the post-conviction hearing that the requirements of *Sensing* were not met. Trial counsel testified that he practiced mainly in criminal law and DUI and was generally familiar with the requirements for administration of an intoximeter test. Trial counsel further noted that he would have objected to the admission of the test had he thought it would have been successful. In addition Petitioner did not show that but for trial counsel’s deficiencies, the jury would have had reasonable doubt as to his guilt. *Strickland*, 466 U.S. at 694-95. The evidence at trial, independent of the results of the breathalyzer test, amply supported the jury’s verdict that Petitioner was guilty of DUI. Petitioner was in a one-car accident and admitted to the officer at the scene that he had been drinking. Further, Petitioner smelled of alcohol and appeared to have urinated and defecated on himself. The officer testified that Petitioner was unsteady on his feet and that his speech was slow. Petitioner refused to perform one of the field sobriety tasks and, in the opinion of the officer, failed the other two. Moreover, the video from the police car was very incriminating for the Petitioner. The evidence does not preponderate against the judgment of the post-conviction court. Petitioner has failed to carry his burden by demonstrating he was prejudiced by counsel’s allegedly deficient performance.

Trial Counsel Falling Asleep During Trial

Petitioner next contends that trial counsel was ineffective because he fell asleep during the trial and was reprimanded by the court. Trial counsel admitted at the post-conviction hearing that

he fell asleep during the police video playback to the jury. Trial counsel acknowledged that he was admonished by the trial court but stated that he had seen the video before. There was no evidence that the jury was aware of what was happening. Although we cannot condone an attorney falling asleep at trial at any time, Petitioner did not introduce any evidence at the post-conviction hearing to establish that this alleged deficiency affected the trial. Petitioner has failed to establish by clear and convincing evidence that he is entitled to post-conviction relief on the basis of ineffective assistance of counsel.

Conclusion

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

JERRY L. SMITH, JUDGE